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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974
No. 73-1932

WILLIAM GRONER,
d/b/a LUCKY DISTRIBUTORS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER TO MEMORANDUM IN OPPOSITION

REASON FOR FILING A REPLY BRIEF

The Petitioner respectfully files this Reply to the Memorandum of the United States in Opposition to Petition for Writ of Certiorari, pursuant to Rule 24(4) of this Court. Petitioner states that this Reply is "addressed to arguments first raised in the briefs in opposition . . ."

REPLY BRIEF

In Point Five (5) of the Memorandum, the government argues that Petitioner's contentions that the material is not obscene merits no further review because "that essentially factual decision was decided against petitioner by the jury and the courts below . . . " This bald assertion flies directly in the face of this Court's decisions in *Hamling v. United States,* ____ U.S. ____, 41 L.Ed.2d 590, *Jenkins v. Georgia,* ____ U.S. ____, 41 L.Ed.2d 642, *Miller v. California,* 413 U.S. 15, and *Jacobellis v. Ohio,* 378 U.S. 184.

In *Jacobellis,* Mr. Justice Brennan said:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. *Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.* Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 US, at 497–498, 1 L ed 2d at 1514, 1515 (separate opinion). *Such an issue, we think, must ultimately be decided by this Court.* Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every

> obscenity case.' Id., at 498, 1 L ed 2d at 1514; see Manual Enterprises, Inc., v. Day, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of HARLAN, J.)."

378 U.S. at 187-188 (emphasis supplied).

In *Miller*, Mr. Chief Justice Burger, in stating that only "hard-core" pornography is to be excluded from the substantive protection of the *First Amendment*, said that:

> "Now we may abandon the casual practice of *Redrup v. New York*, 386 U.S. 767 (1967), and attempt to provide positive guidance to federal and state courts alike.
>
> This may not be an easy road, free from difficulty. But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale – an absolutist, 'anything goes' view of the First Amendment – because it will lighten our burdens. 'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 187-188 (Opinion of Brennan, J.)

413 U.S. at 29.

In exercising its independent review and judicial supervision responsibility, this Court, in *Hamling*, supra, and *Jenkins*, supra, reaffirmed the principles set forth in *Jacobellis* and *Miller*. An independent review of the materials in question was conducted, this Court agreeing with the jury and lower courts in *Hamling*, and disagreeing with them in *Jenkins*. This position was strongly emphasized in *Jenkins* by Mr. Justice Rehnquist when he stated for a unanimous court that "... it would be a serious misreading of *Miller* to

conclude that juries have unbridled discretion in determining what is 'patently offensive.' [We said there] that 'the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,' 413 U.S., at 25 . . . " *Jenkins*, supra, ____ U.S. ____, 41 L.Ed.2d at 650.

It is thus eminently clear that the government's assertion that petitioner's *First Amendment* claims merit no further review is wholly out of line with this Court's stated principle that it is the ultimate determiner of substantive rights under the *First Amendment*.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition and the Supplement thereto, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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